No. 99-20

Supreme Court, U.S.
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In The

Supreme Court of the United States

GLORIA ROBINSON, as Plan Administrator of the Landmark Insurance Group Plan and Landmark 501(c)(9) Trust Agreement for the Landmark Group and as a participant of the Landmark Group Insurance Program and the 501(c)(9) Trust Agreement for the Landmark Group, *et al.*,

Petitioners,

v.

CLOCK TOWER PLACE INVESTMENTS, LIMITED, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

GERALD P. GREEN
Counsel of Record
HAVEN TOBIAS
PIERCE COUCH HENDRICKSON BAYSINGER & GREEN, L.L.P.
1109 N. Francis
Oklahoma City, OK 73106
(405) 235-1611

H. BLANTON BROWN
DOUGLAS D. WILGUESS
H. BLANTON BROWN & ASSOC., P.C.
100 N. Broadway, Suite 3150
Oklahoma City, OK 73102
(405) 232-8523

THOMAS S. TISDALE, JR.
STEPHEN P. GROVES
YOUNG, CLEMENTS, RIVERS & TISDALE, L.L.P.
28 Broad Street
Charleston, SC 29402-0993
(843) 720-5488
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Propriety of certiorari as a procedural matter

Although respondent, Federal Deposit Insurance Corporation, asserts that due process was satisfied, it does not, because it cannot, point to any finding of the district court or the Court of Appeals that petitioners were unknown claimants or that their claims were "conjectural". There are no such findings in the record. On the other hand, the fact that petitioners' claims were known, and that on the date bankruptcy proceedings were commenced, their claims were more than merely conjectural is supported by strong evidence in the record below. Pet.App. 22-31.

Respondent suggests that the inclusion of petitioners in the creditor listing is not sufficient to establish that they were known creditors, but respondent does not attempt to suggest why they would have been listed on the same basis as all other creditors, if their claims were uncertain or speculative. Nor does respondent explain why pre-petition "claims" stemming from health care plan obligations were being addressed by the court as early as two weeks after the bankruptcy was filed.

As the district court recognized in the record below, Robinson was aware of the payments made to ineligible health care recipients. Respondent argues that Robinson's awareness constitutes constructive knowledge to be imparted to all the petitioners, and satisfies due process. By respondent's reasoning, Robinson's knowledge of these payments, as an employee of the plan administrator, establishes that the debtors, as her employers, were aware of the claims.

This record notwithstanding, respondent maintains that petitioners' challenge boils down to the argument that the lower courts "erred in failing to consider the legal significance of the fact . . . " Respondent thereby implies that petitioners are merely arguing that the lower courts failed to consider and/or resolve certain disputed facts. Not so. It is petitioners' position that the district court and the Court of Appeals applied the wrong law to the undisputed facts. Had the lower courts considered the legal significance of the facts, they would correctly have determined that petitioners were entitled to actual notice, and because of the failure to provide them actual notice, are now entitled to file their claims.

Because petitioners were known creditors having known claims, the holding of the courts below that constructive notice satisfied due process was wrong and fundamentally unfair. In *Braxton v. U.S.*, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991), it was said that "a principal purpose" for the exercise of certiorari jurisdiction is to resolve conflicts among the courts concerning "the meaning of provisions of federal law", which would most certainly include the requisites of due process. This matter is accordingly appropriate for a grant of certiorari.

Propriety of certiorari as a substantive matter

Respondent restates the "question presented" as: "Whether the district court erred in denying petitioners' administrative claim on timeliness grounds". In the lower courts, petitioners raised many issues besides the denial of their request to file an administrative claim out of time. Nevertheless, petitioners reply to the central argument

made by respondent – to wit, petitioners were not entitled to actual notice of the bankruptcy proceedings because their "administrative claims" were "conjectural".

This Honorable Court did not define "conjectural" in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), ("beneficiaries whose interests are either conjectural or future") nor did it define the term in *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) ("it is reasonable to dispense with actual notice to those with mere 'conjectural' claims").

Turning to prosaic sources, the garden variety definition of "conjecture" is "inference based on incomplete or inconclusive evidence" (*Webster's II*), and *Black's* offers the following:

> A slight degree of credence, arising from evidence too weak or too remote to cause belief. Supposition or surmise. The idea of a fact, suggested by another fact; as a possible cause, concomitant, or result. An idea or notion founded on a probability without any demonstration of its truth; an idea or surmise inducing a slight degree of belief founded upon some possible, or perhaps probable fact of which there is no positive evidence . . . In popular use, synonymous with 'guess'.

Debtors knew when bankruptcy proceedings were instituted, and well before, that the payroll deductions made for the purported purpose of funding the health care plan had been commingled with other assets of the debtors. Debtors knew that the payroll deductions ought not have been commingled with their own assets, but

rather, in order to comply with the mandate of ERISA, paid into trust.

Debtors knew that the commingled funds, which included the funds subject to trust, were used to pay improper claims. Debtors knew those payments were being made to persons who were not eligible to participate in the health care plan.

Debtors thus knew when bankruptcy proceedings were instituted, and well before, that there was money owed to the fund and the participants to reimburse the payments to ineligibles. Debtors knew that the residue of the assets of the trust were the property of its beneficiaries (the prior plan participants). They knew those assets had been diminished by the improper payments.

Petitioners were participants in the plan and are beneficiaries of the trust who were known to debtors and who were known to have claims that were not and are not merely conjectural.

Participants' claim to the reimbursement of the wrongfully diverted plan funds and to the residue of the trust assets is not the creature of inference, supposition or surmise. It is more than possible, it is more than probable; it is actual, and is supported by strong evidence. It is not merely conjectural.

Conclusion and prayer for relief

Debtors knew of petitioners' claims, petitioners' claims were not and are not merely conjectural, the Court of Appeals erred in holding that constructive notice satisfied due process, and this issue is an appropriate basis for

certiorari relief. Petitioners respectfully request that this Honorable Court direct the Court of Appeals to remand this matter to the district court with instructions to permit petitioners to file their claims on behalf of the Plan and the Trust.

Respectfully submitted,

GERALD P. GREEN
Counsel of Record
HAVEN TOBIAS
PIERCE COUCH HENDRICKSON
BAYSINGER & GREEN, L.L.P.
1109 N. Francis
Oklahoma City, OK 73106
(405) 235-1611

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DOUGLAS D. WILGUESS
H. BLANTON BROWN & ASSOC., P.C.
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